No. 86339

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL.

PAUL E. HOOVER, JR.,

Appellant,

v.

TED BOEHM, Sheriff,

Boone County, Missouri,

Respondent.

Original Proceeding
Petition for Writ of Habeas Corpus

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This case involves an original petition for writ of habeas corpus under Missouri Supreme Court Rules 84.22 to 84.26, 91.01 et seq. and Chapter 532, RSMo. 2000. This is an original proceeding for writ of habeas corpus that was filed with this court on October 6, 2004. Jurisdiction over this cause lies with the Missouri Supreme Court. Missouri Constitution, Article V, Section 4.1; §532.030, RSMo. 2000; Missouri Supreme Court Rules 91.01(a), (b); 91.02(a).

Named respondent, Ted Boehm, Sheriff of Boone County, is petitioner's custodian and is the proper party respondent. Missouri Supreme Court Rules 91.04, .07.

STATEMENT OF FACTS

Petitioner filed his petition for writ of habeas corpus with the Supreme Court of Missouri on October 6, 2004. After receiving the government's October 25, 2004 response to order to show cause why a writ of habeas corpus should not issue, the court issued a writ of habeas corpus on October 29, 2004. The writ waived production of the petitioner, but ordered respondent to file a return. The government filed the return on November 5, 2004. Briefing by the litigants ensued.

Previously, petitioner sought state habeas relief from the Missouri Court of Appeals. The Missouri Court of Appeals denied habeas relief. In Re Paul E. Hoover v. Honorable Ted Boehm, No. 64621 (Mo. App. W.D. Oct. 4, 2004). Litigation of the petition for writ of state habeas corpus then began before this court. O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

On March 17, 2004, petitioner pled guilty to unlawful use of a weapon, a Class A misdemeanor and third degree domestic assault, also a Class A misdemeanor (App. A-4). This plea was entered knowingly and voluntarily (App. A-4). On Count I, petitioner was sentenced to 40 days in the Boone County Jail with credit for time served. As to Count II, petitioner was sentenced to six months in the Boone County Jail (App. A-4). The circuit court suspended execution of sentence on Count II and placed petitioner on two years of supervised probation (App. A-4).

Shortly thereafter, on April 8, 2004, petitioner violated the terms of probation by physically and telephonically contacting his victim in criminal violation of the order of protection (App. A-9). Petitioner had violated the terms of his probation by violating

Condition No. 1, laws, by criminally violating an order of protection regarding Kelly Hoover (App. A-9). On July 26, 2004, the circuit court conducted a probation revocation hearing that eventually led to the revocation of probation on September 27, 2004.

On October 26, 2004, petitioner was also placed on probation due to his conviction in State v. Paul Hoover, No. 04CR164291 (Boone County Circuit Court). That is not at issue in this litigation.

In his brief on appeal to this court, petitioner states that he was acquitted on one of the underlying charges, and the state entered a nolle prosequi on the other (Petitioner's Brief - hereinafter Pet. Brf. - pages 8-9). That is not quite accurate. While acquitted of one charge, petitioner is currently scheduled for trial for the second charge on December 16, 2004. State v. Paul E. Hoover, Jr., No. 04CR166183-01 (Boone County Circuit Court).

ARGUMENT

THE SUPREME COURT SHOULD QUASH THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT'S PROBATION REVOCATION PROCEEDINGS WERE LAWFUL IN THAT PETITIONER'S DUE PROCESS RIGHTS WERE ADEQUATELY PROTECTED BY THE CIRCUIT COURT (Responds to Points I and II).

Initially, petitioner complained that his rights were violated at the July 26, 2004 probation revocation hearing. In particular, petitioner complains that the trial court admitted hearsay evidence. Since the record revealed no prejudicial error by the trial court, the writ of habeas corpus should be set aside.

Petitioner contends that his Sixth Amendment right to confrontation was violated at the revocation hearing because the trial court admitted hearsay evidence. Petitioner alleges that his probation officer testified about "the contents of arrest reports generated by petitioner's estranged wife and a conversation between her and the estranged wife" (Petition, page 2, paragraph 2).[1] At the conclusion of the evidence, the court was satisfied that petitioner had violated the Condition No. 1 of probation, a laws violation (App. A-5). Upon rehearing, the

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[1]Petitioner did not present a transcript of the July 26, 2004 revocation hearing with his petition for writ fo habeas corpus. Review of that transcript, previously submitted to the court as Respondent's Exhibit A, discloses that petitioner objected only to "those police reports" (Tr. 5). Petitioner had no objection, and in fact he elicited the testimony by the probation officer about the wife's statements (Tr. 8).

circuit court found on August 31, 2004, that petitioner had violated Condition No. 1, laws, by finding that petitioner had criminally violated his wife's order of protection by contacting her on the parking lot of Boone Hospital and by contacting her by telephone (App. A-6). The circuit court found that the probation officer's testimony was admissible because petitioner had the opportunity to confront and cross-examine the probation officer (App. A-6). On September 27, 2004, the circuit court ordered execution of sentence (App. A-7).

Petitioner is entitled to no relief. Initially, petitioner contends that he is entitled to relief under In Re Carson, 789 S.W.2d 495 (Mo. App. S.D. 1990) (Pet. Brf., page 13). To the contrary, the circuit court properly admitted the testimony by the probation officer since petitioner had the opportunity to cross-examine that officer (App. A-5). In In Re Carson, the Missouri Court of Appeals for the Southern District joined the Court of Appeals for the Eastern District in interpreting in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) to allow a revocation of probation on the basis of hearsay evidence so long as the offender has the opportunity to cross-examine the witness offering hearsay evidence.

> The determination in Moore [v. Stamps, 507 S.W.2d 939 (Mo. App. E.D. 1974)] was made with the acknowledgments that: (1) a probation revocation is not a part of the criminal prosecution process and, therefore, the evidence standard is not the reasonable doubt standard but that the hearing judge need only be reasonably satisfied that terms of probation were violated; and (2) hearsay evidence may form a basis to revoke probation if the probationer or counsel may

> cross-examine witnesses offering hearsay evidence. Id. at 949. In making the determination, the court further pointed out that although Morrissey and Gagnon do not apply strictly to judicial revocation of probation, "the spirit of those decisions" requires the minimal rights of due process set forth in Moore. Id.

In Re Carson, 789 S.W.2d at 497. These concepts were approved by this court in State ex rel. Mack v. Purkett, 825 S.W.2d 851 (Mo. banc 1992).

> As Morrissey and Gagnon made clear, the due process right to confrontation at a parole revocation hearing is less stringent than the Sixth Amendment's confrontation guarantee in a criminal trial. Evidence that would violate the Sixth Amendment or would be inadmissible hearsay if presented at a criminal trial may, in proper circumstances, be considered at a parole or probation revocation hearing without violating the due process right to confrontation.

Id. at 855.

In contrast with this settled law, petitioner asserts that his confrontation clause rights were violated under Crawford v. Washington, 124 S.Ct. 1354 (2004). Petitioner's confrontation clause claim, however, does not entitle him to relief. As stated by this court in Mack v. Purkett, the rules in Morrissey and Gagnon concerning probation revocation proceedings are rules derived from the Fourteenth Amendment due process clause, not the Sixth Amendment confrontation clause. 825 S.W.2d at 855. As noted in In Re Carson, the probation revocation hearing is not part of the criminal prosecution; thus, the Sixth

Amendment right to confrontation is not implicated. 789 S.W.2d at 497. This position has been recently reaffirmed by the United States Court of Appeals for the Eighth Circuit in United States v. Martin, 382 F.3d 840, 844 (8th Cir. 2004). See also People v. Pennywell, 2004 WL 2110841 at *3-4 (Cal. Ct. App. 6th Dist. 2004) (not officially published) (declining to extend confrontation clause - Crawford to revocation proceeding); United States v. Barraza, 318 F.Supp. 2d 1031, 1032-35 (S.D. Cal. 2004) (declining to extend confrontation clause - Crawford to revocation proceeding); People v. Turley, 2004 WL 2503584, at *1 (Col. Ct. App., Oct. 21, 2004) (Crawford inapplicable to probation revocation proceedings). Petitioner presents no legal authority that supports his position (Pet. Brf., page 13).

At the July 26, 2004 probation revocation hearing, petitioner made only one objection. Petitioner objected to the admission of "statements from any other parties with regard to – that may be contained in those police reports" (Tr. 5). The trial court overruled that objection (Tr. 5). The probation officer testified the information from a police officer concerning petitioner's criminal violation of an order of protection when he contacted his estranged wife on the parking lot at Boone Hospital Center on Broadway (Tr. 5). The probation officer also testified about a police officer's receipt of information from the wife about petitioner's continuing telephone calls in criminal violation of the full order of protection (Tr. 6). This information was corroborated by the wife's caller ID feature (Tr. 6). Those telephone calls occurred between April 3 and April 7, 2004 (Tr. 8).

The probation officer also testified about the confirmation she received directly from the wife about the police reports. Petitioner presented no objection to this information (Tr.

8). Hearsay statements, if not objected to, are admissible and may be considered by the trier of fact along with other evidence. State v. Albarado, 6 S.W.3d 197, 203 (Mo. App. S.D. 1999).

> She said that the reports I got were accurate. She said that he was stalking her - - she said she didn't want anything to do with him, that he was stalking her and violated the ex parte that weekend, the weekend before the call.

(Tr. 8).

Petitioner also testified at the probation revocation hearing. The state did not object on the basis of foundation or hearsay to text messages from petitioner's cell phone or to any other testimony (Tr. 17, 18). Petitioner admitted having contact with his wife at "Broadway Center" (Tr. 20). Petitioner admitted that he made phone calls to his wife (Tr. 19). During his testimony, petitioner attempted to rationalize his conduct by suggesting that asking his wife to have a cup of coffee and to talk was allowed by the order of protection (Tr. 20). Petitioner also suggested that his telephone calls concerned his arranging to pick up his property (Tr. 19, 22). Petitioner testified that all five calls on April 3 and all four calls on April 4, as well as those on April 5, 6 and 7 concerned the topic of petitioner "getting [his] stuff" (Tr. 22). Of course, the circuit court was free to disbelieve the self-serving aspect of petitioner's testimony (Tr. 22).

At the conclusion of the revocation hearing, petitioner referred the court to In Re Carson, supra, concerning the due process right to confrontation (Tr. 24). As noted, the Carson court indicated that the due process right to confrontation was protected where the

offender had the opportunity to cross-examine the witness. Petitioner not only had the opportunity, he exercised that opportunity. Accordingly, petitioner received from the trial court all the relief he requested under the Carson decision.

In his brief to this court, petitioner complains for the first time that the state presented no reason or justification for failing to call the complaining witness (App. Brf., page 12). Petitioner did not present this complaint to the trial court (Tr. 5). Petitioner did not present this claim in his petition for writ of habeas corpus. Instead, that claim appeared for the very first time in petitioner's November 5, 2004 brief (Pet. Brf., page 12).

Of course, petitioner's complaint is unavailing for several reasons. First, to the trial court, petitioner did not object on the basis there was no showing of justification for hearsay (Tr. 5). State ex rel. Mack v. Purkett, 825 S.W.2d at 856. Second, the state produced Mary Ann Costillo, petitioner's probation officer to testify at the revocation hearing (Tr. 3-4). Petitioner had the opportunity to cross-examine the probation officer, and this alone should satisfy the due process requirement of Gagnon and Morrissey. See In Re Carson, supra; People v. Turley, 2004 WL 2503584 (Col. Crt. of App. Oct. 21, 2004). Third, the information was reliable. Indeed, without objection from the state, petitioner adduced additional hearsay evidence (Tr. 8) about which he now complains (Pet. Brf., page 12). Given the fact that petitioner adduced this evidence (Tr. 8) and given petitioner's corroboration of contact with his victim (Tr. 19-22) and given the government's willingness to allow petitioner to adduce his own hearsay evidence (Tr. 17, 18), petitioner does not show any entitlement to relief.

Further, petitioner does not contest that the hearsay testimony was demonstrably

reliable. State ex rel. Mack v. Purkett, 825 S.W.2d at 857. Petitioner does not contend that the victim would have testified that there was no contact by petitioner with the victim (Pet. Brf., pages 11-16). Indeed, petitioner corroborated that testimony himself at the hearing (Tr. 18-22). That testimony was also corroborated by petitioner's cross-examination of the probation officer (Tr. 8).

Finally, petitioner complains that the trial court did not make a finding about whether revocation was warranted under all the circumstances (Pet. Brf., page 15 quoting §559.036.4, RSMo. 2000). That statute provides:

> Probation shall not be revoked without giving the probationer notice and an opportunity to be heard on the issues of whether he violated a condition of probation and, if he did, whether revocation is warranted under all the circumstances.

Id. Petitioner was given that opportunity as required by this statute at his July 26, 2004 hearing (Tr. 3). Petitioner made arguments concerning whether revocation was warranted under all the circumstances (Tr. 25). Petitioner continued to make arguments at the August 16, 2004 hearing (Tr. 27-30), at the September 13, 2004 hearing (Tr. 31-33) and at the September 27, 2004 hearing (Tr. 34-36). Petitioner complains that there was not a finding by the trial court about whether revocation was warranted under all the circumstances (Pet. Brf., page 15). Of course, the statute does not express such an obligation upon the trial court. Section 559.036.4, RSMo. 2000. Even there were such an obligation, it is apparent that the trial court felt that revocation was warranted under all the circumstances due to the trial court ordering the

revocation of probation after several months of consideration (App. A-5 to A-6; Tr. 36). Petitioner's final claim is meritless.

CONCLUSION

For the foregoing reasons, respondent prays the court enter an order quashing the October 29, 2004 writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of November, 2004.

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